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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-979

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	4
Statement	4
The Questions are Substantial	9
I. The Commission's Orders Unconstitutionally Prohibit Appellant From Issuing Senior Securities	9
II. The Commission's Orders Unconstitutionally Burden Interstate Commerce	17
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Andrews v. *Virginian Railway*, 248 U.S. 272 (1919)	3
Atchison, Topeka & Santa Fe Railway v. *Public Utilities Commission of California*, 346 U.S. 346 (1953)	2, 3
Atlantic Greyhound Corporation v. *Public Service Commission of West Virginia*, 132 W. Va. 650, 54 S.E. 2d 169 (1949)	4
Bluefield Water Works & Improvement Company v. *Public Service Commission of West Virginia*, 262 U.S. 679 (1923)	2, 4, 9, 15, 16
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	4, 9, 16, 22
Grand Trunk Western Railway v. *Railroad Commission of Indiana*, 221 U.S. 400 (1911)	3
Lake Erie & Western Railroad v. *State Public Utilities Commission of Illinois*, 249 U.S. 422 (1919)	2
Mississippi Power Company v. *Mississippi Public Service Commission*, 291 So.2d 541 (Miss. 1974)	14
Napa Valley Electric Company v. *Railroad Commission of California*, 251 U.S. 366 (1920)	3
Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967)	3

	PAGE
Niagara Mohawk Power Corporation, 14 N.Y.P.S.C. 1244 (1974)	14
Prentis v. *Atlantic Coast Line Company*, 211 U.S. 210 (1908)	3
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945)	20, 21
Utah Power & Light Co. v. *Pfost*, 286 U.S. 165 (1932)	20
Statutes:	
United States Constitution	
Article I, Section 8, Clause 3	4, 8
Fifth Amendment	4, 7, 9
Fourteenth Amendment	4, 7, 9
United States Code	
Federal Power Act, 16 U.S.C. § 824(a), *et seq.*	20, 21
Judiciary and Judicial Procedure Act of 1948, 28 U.S.C. § 1257(2)	2, 3
and § 2103	4
Interstate Commerce Act, 49 U.S.C. § 1, *et seq.*	20
Other Authorities:	
Federal Power Commission: *The 1970 National Power Survey, Part I*, p. I-1-17	10
SEC Public Utility Holding Company Act Release Nos. 13,105 and 13,106 (February 16, 1956); 3 Fed. Sec. L. Rep. (CCH) ¶¶ 36,675 and 36,691	13
Standard & Poor's Corporation: *Bond Guide*, September 1976, p. 6	16
Standard & Poor's Corporation: *Fixed Income Investor*, April 17, 1976, p. 760	17
National Electric Reliability Council: *7th Annual Review of Overall Reliability and Adequacy of the North American Bulk Power Systems*, July 1977, inside front cover and p. 7	19
N. Y. Times, April 19, 1977 at 24, col. 1	23

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JURISDICTIONAL STATEMENT

Appalachian Power Company ("Appellant", "Appalachian" or "the Company") appeals from an order of the Supreme Court of Appeals of West Virginia ("West Virginia Court") entered on October 10, 1977 upholding certain orders of The Public Service Commission of West Virginia ("Commission"). Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial questions presented.

Opinion Below

The order of the West Virginia Court entered October 10, 1977 is not officially reported. The orders of the Commission upheld by the West Virginia Court were issued May

6, May 9, July 29, August 26 and August 30, 1977 in the Commission's Case No. 8182 and are not officially reported. A copy of each order and notice referred to herein is included in the separate Appendix.

Jurisdiction

This appeal is brought to review orders of the Commission affecting rates charged for electric utility service to Appalachian's retail customers in the State of West Virginia.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) to review a final judgment rendered on October 10, 1977 by the West Virginia Court. The West Virginia Court is the highest court of that State in which a decision could be had. The validity of certain statutes of West Virginia was drawn in question in the West Virginia Court on the ground of their being repugnant to the Constitution of the United States, and the decision of the West Virginia Court on October 10, 1977 was in favor of the statutes' validity.

The statutes which are the subject of this appeal are the Commission's order of May 6, 1977, as modified and affirmed as aforesaid. Appellant filed its Notice of Appeal with the Commission (the court possessed of the record) on October 14, 1977.

The following decisions sustain jurisdiction by appeal because the Commission's orders are "statutes" within the purview of 28 U.S.C. § 1257(2): *Atchison, Topeka & Santa Fe Railway* v. *Public Utilities Commission of California*, 346 U.S. 346, 348 (1953); *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 683 (1923) (hereinafter "*Bluefield*"); *Lake Erie & Western Railroad* v. *State Public Utilities Commission of Illinois*, 249 U.S. 422, 424 (1919);

and *Grand Trunk Western Railway* v. *Railroad Commission of Indiana*, 221 U.S. 400, 403 (1911).

The following decisions further sustain jurisdiction by appeal on the basis that the October 10, 1977 order of the West Virginia Court was a "final judgment" of the highest court of that State in which a decision could be had and a "decision" in favor of the validity of the statutes drawn in question: *Atchison, Topeka & Santa Fe Railway* v. *Public Utilities Commission of California, supra* at 349; and *Napa Valley Electric Co.* v. *Railroad Commission of California*, 251 U.S. 366, 372-373 (1920).

In the event that the West Virginia Court order of October 10, 1977 is construed as not being a "final judgment" or as not being a "decision" in favor of the statutes' validity within the meaning of 28 U.S.C. § 1257(2), jurisdiction of this Court is invoked alternatively pursuant to 28 U.S.C. § 1257(2) to review by direct appeal the final order of the Commission rendered on July 29, 1977, as revised, modified and affirmed by its orders of August 26 and August 30, 1977.[1] In rendering these orders, the Commission acted in its quasi-judicial capacity by reviewing Appellant's petition for rehearing and was therefore the highest court of the state in which a decision could be had. In such capacity the Commission rendered its "decisions" in favor of the validity of the May 6 and May 9 orders which are "statutes" drawn in question on the ground of their repugnance to the Constitution of the United States. See *Prentis* v. *Atlantic Coast Line Company*, 211 U.S. 210, 223-226 (1908), which

1 *Nash* v. *Fla. Indus. Comm.*, 389 U.S. 235, 237 (1967). Docketing an appeal from these orders of the Commission was timely made because the 90-day period for docketing commenced at the same time as an appeal from the order of the West Virginia Court. No appeal could be taken prior to that date because the orders of the Commission were susceptible of being reviewed and reversed until that Court had acted. See *Andrews* v. *Virginian Ry.*, 248 U.S. 272, 275 (1919).

recognizes that a state public utilities commission may be a "court" within the meaning of federal statutory provisions, and *Atlantic Greyhound Corporation* v. *Public Service Commission of West Virginia,* 132 W. Va. 650, 659, 54 S.E.2d 169, 174 (1949), which recognizes that the Commission possesses quasi-judicial powers. Notice of Appeal from the Commission's order of July 29, 1977, as revised, modified and affirmed by its orders of August 26 and August 30, 1977, was filed with the Commission on January 3, 1978.

In the event that appeal is not considered the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

Questions Presented

I. Whether the Commission's rate order of May 6, 1977, as modified and affirmed, which precludes Appalachian from legally issuing additional long-term debt securities or preferred stock, violates the Fifth and Fourteenth Amendments of the United States Constitution and the criteria set forth in *Bluefield* and *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944) (hereinafter "*Hope*").

II. Whether the Commission's rate order of May 6, 1977, as modified and affirmed, which precludes Appalachian from raising capital necessary for timely construction of facilities required for service to millions of consumers in numerous states, is an unconstitutional burden on or interference with interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

Statement

Appalachian, the largest public utility in West Virginia, is engaged in the production, transmission and distribu-

tion of electric energy at wholesale and retail, and serves more than 348,000 customers in the State. The rates which Appalachian charges its retail customers in West Virginia, and the terms and conditions of service affecting those customers, are regulated by the Commission.

Appalachian also serves over 330,000 customers in Virginia whose service is regulated by the Virginia State Corporation Commission. In addition, Appalachian serves 21 wholesale customers whose service is regulated by the Federal Energy Regulatory Commission (hereinafter "FERC"). Appalachian is a wholly-owned subsidiary of American Electric Power Company, Inc. (hereinafter "AEP"), a registered public utility holding company. Through their integrated generation and transmission system, AEP's operating subsidiaries serve directly territory having a population exceeding 6,000,000 people from east of the Blue Ridge Mountains to the shores of Lake Michigan—in Virginia, Tennessee, Kentucky, West Virginia, Ohio, Indiana and Michigan.

Appalachian filed with the Commission on March 31, 1975 tariff schedules based upon a calendar year 1974 test period which increased rates then in effect.[2] The new rates became effective on August 28, 1975, under bond and subject to refund. These rates produced approximately $41 million annually above the levels previously approved by the Commission. Hearings scheduled by the Commission commenced in July 1975 and were completed in August 1976. During these hearings and upon petition for rehearing, Appalachian submitted uncontradicted evidence which proved:

> (1) Minimum earnings requirements must be met in order legally to issue additional long-term debt securities or preferred stock;

2 At numerous times throughout the proceeding Appalachian attempted to have rates established on the basis of more current information. The Commission consistently refused.

(2) The credit rating of Appalachian's long-term debt and preferred stock was the lowest of any major electric utility in the United States;

(3) The construction program of Appalachian, which must be completed in a timely manner in order to provide adequate service to more than 678,000 customers in West Virginia and Virginia, requires the expenditure of more than $1 billion between 1976 and 1980; and

(4) Rate levels finally authorized by the Commission would prohibit Appalachian from legally issuing additional long-term debt securities or preferred stock.

On May 6, 1977—more than two years after Appalachian's filing—the Commission issued its order establishing for Appalachian one rate level for the period August 28, 1975 through April 30, 1976, and another rate level for the period on and after May 1, 1976. The first rate level allowed an increase of approximately $15 million annually or 36% of the requested rate increase. The second rate level allowed an increase of approximately $20 million annually or approximately 49% of the requested rate increase. Appalachian was directed to file new tariff schedules that would reflect the level of rates which the Commission found appropriate based on the 1974 test year. It was also ordered to refund to customers amounts collected in excess of such levels since August 28, 1975 which together with interest were approximately $45 million. In its May 6, 1977 order the Commission acknowledged that Appalachian must have an improvement in earnings in order to satisfy "the electricity demands of an energy-short public."[3] However, it did not even discuss the

3 Appendix, p. 30a.

Company's interest coverage requirements necessary to issue additional senior securities in order to finance the facilities necessary to meet those electricity demands.

On May 16, 1977 Appalachian petitioned the Commission for rehearing with respect to its order of May 6, 1977. Among other issues, Appalachian alleged in its petition that the end result of the Commission's order violates the Fifth and Fourteenth Amendments of the United States Constitution in that "the rates which the Commission established are legally insufficient to permit Appalachian to raise the money necessary to discharge its public duty to provide electric utility service."[4] The Chief Financial Officer of Appalachian and AEP, in an affidavit accompanying the petition, showed that the end result of the Commission's May 6, 1977 order was to reduce revenues to the point where the Company's interest coverage ratios were below the legal minimum necessary to issue any additional long-term debt securities.

On July 29, 1977 the Commission issued its order denying the rehearing sought in Appalachian's May 16th petition. Among other things, this order rejected the significance of interest coverage ratios in determining the adequacy of public utility rates. The Commission declared that coverage ratios are "no more than a security device used to restrain a company from imprudent future debt financing."[5] The Commission repeated its belief that the end result of its May 6, 1977 order is "eminently just and reasonable."[6]

On August 26, 1977 Appalachian filed its petition with the West Virginia Court seeking review of the Commission's

4 Petition for Rehearing, May 16, 1977, p. 2.

5 Appendix, p. 91a.

6 *Id.* at 92a. Pursuant to this order, Appalachian filed with the Commission on August 15, 1977 tariff schedules which were approved by the Commission on August 30, 1977.

orders of May 6 and July 29, 1977.[7] The petition and its accompanying note of argument renewed the constitutional claims asserted before the Commission and argued that the end result of the Commission's order failed to permit Appalachian to attract or even legally issue the senior capital necessary to discharge its public duties.[8] Appellant further asserted that the effect of the Commission's orders "places an undue burden upon and interferes with interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution. . . ."[9]

On October 10, 1977 the West Virginia Court, with one Justice dissenting, made and entered an order that in its opinion Appalachian had "not shown itself entitled to the relief prayed for in its said petition"[10] and on October 14, 1977 Appalachian filed its Notice of Appeal to this Court.

On October 26, 1977, after having been denied effective relief by both the Commission and the West Virginia Court upon its request for a stay of the Commission's orders, Appellant was granted a stay by The Honorable Chief Justice Warren E. Burger pending consideration of the Commission's response to Appellant's application for the stay. In the absence of this stay, Appellant would have

7 On August 26, 1977 the Commission ordered reopening of the proceeding to determine the reasonableness of a third tier rate level commencing May 1, 1977 (Appendix, p. 96a). The reopening is limited to consideration of Appalachian's increased coal expense since May 1, 1977. Accordingly any increase in rates subsequent to May 1, 1977 would be limited to the recovery of fuel expense already incurred and would not improve the Company's May 1, 1977 coverage levels. Even if the Commission authorizes full recovery of increased fuel expense since May 1, 1977, the related improvement in subsequent and current coverage levels would still not achieve the minimum levels required to issue senior securities.

8 Note of Argument, August 26, 1977, p. 16.

9 Petition, August 26, 1977, p. 7.

10 Appendix, p. 101a.

been required to make refund payments approximating $45 million before this appeal could be considered. After filing of the Commission's response and Appellant's reply thereto. The Honorable Chief Justice Warren E. Burger ordered a further stay on November 18, 1977, which has afforded Appellant an effective opportunity to submit this Jurisdictional Statement.

The Questions are Substantial

I.

The Commission's Orders Unconstitutionally Prohibit Appellant From Issuing Senior Securities.

The first question presented for the Court's consideration is the fundamental issue whether public utility rates which are so low as to preclude the utility from legally issuing additional long-term debt securities (except for refunding of maturing long-term debt issues under certain conditions) or preferred stock are violative of the Fifth and Fourteenth Amendments of the United States Constitution and the constitutional criteria set forth in *Bluefield* and *Hope*.

Appellant is unaware of any decision by this Court involving public utility rates which has specifically considered this question. However, as will be demonstrated, the minimum criteria of constitutional reasonableness which have been established in numerous decisions necessarily embrace the legal ability to issue additional long-term debt and preferred stock, the types of capital least expensive to the utility's rate-payers.

The resolution of this issue has far-reaching consequences for the more than 678,000 customers served by Appalachian in West Virginia and Virginia and approximately 2,000,000

customers served by operating subsidiaries of AEP in seven states. If Appalachian is unable to attract the new capital necessary to carry out its construction program in a timely manner, its ability to provide safe and reliable intrastate and interstate service will be jeopardized; and customers will face the strong likelihood of frequent and prolonged interruptions of electric utility service with their attendant economic and social disruptions.

A. The Need to Raise Additional Capital

The uncontradicted evidence before the Commission is that Appalachian is in the midst of a massive construction program which cannot be delayed if the Company is to be able to carry out its public utility service obligations during the next several years. The Company's construction program for the period 1976-80 is in the range of $1.2-$1.3 billion. To place this in perspective, it is an amount which exceeded Appalachian's net plant in service at December 31, 1975.

This vital construction program includes the completion by the winter of 1980/81 of a 1300-megawatt generating unit ("Project 1301") at a total cost approximating $600 million. Failure to place Project 1301 in service by the winter of 1980/81 will result in a dangerous capacity shortage for both Appalachian and all its sister operating companies in the seven-state AEP System.

The Federal Power Commission (now FERC) has concluded that electric utility industry planning should be based upon utilities' generating capacity exceeding customer demand by an average of 20% to assure reasonably reliable service.[11] By contrast, this winter Appalachian has the

11 Federal Power Commission: *The 1970 National Power Survey, Part I*, p. I-1-17. The *Survey* stated in part: "This conclusion was reached in light of the industry's increasing dependence on large generating units and the consequent need for large blocks of reserve capacity to offset unscheduled outages." *Id.*

capacity to serve a demand only 1% greater than the anticipated maximum demand of its customers. It will be able to meet the requirements of its customers only through reliance upon its sister companies. The record shows that by the winter of 1980/81 Appalachian's capacity, in the absence of Project 1301, will be more than 15% *below* its customers' projected requirements and the capacity reserve of the entire AEP System will be just 6.9%, a level not only entirely insufficient to assist Appalachian in meeting the projected demands of its own customers in West Virginia and Virginia but, beyond that, jeopardizing the reliability of service to the other AEP System customers in Tennessee, Kentucky, Ohio, Indiana and Michigan.

Other parts of Appellant's construction program are equally vital to its continued ability to provide reliable service. The Company must complete a major transmission line (at a cost estimated to exceed $70 million) by late 1979[12] in order to offset the likelihood of major and continuing blackouts to its customers in West Virginia south of Charleston and in neighboring portions of Virginia and Kentucky.

The evidence of the need for this enormous new construction was substantial and was uncontradicted by any party to the proceeding. In its decision, the Commission did not question the Company's construction requirements. The West Virginia Court made no mention of Appalachian's requirements for new plant.

B. The Ability to Raise Additional Capital

The uncontradicted evidence is that, even if the full amount requested in this case is allowed, Appalachian is able to generate internally through depreciation accruals and other sources only about $80 million per year to

12 The estimated cost of construction has since risen to more than $90 million with completion expected in 1980.

help meet its capital requirements when in 1978 its construction program is exceeding $360 million per year. Thus, Appalachian must be able to attract from external sources, including its parent, more than $280 million per year[13] to finance its construction program and complete the sorely needed facilities referred to earlier.

AEP, the parent, invested $80 million in the common stock equity of Appalachian during 1977. The Chief Financial Officer of Appalachian and AEP testified that the amount of such investment is restricted by market limitations on the sale of additional AEP common stock equity to the public and also by the equity requirements of AEP's other major operating subsidiaries. It is clear that even such an extraordinary infusion of capital (amounting to over 15% of Appalachian's total common equity capital), together with internally generated funds approximating $80 million per year, falls short of satisfying Appalachian's present annual capital requirements by approximately $200 million per year.

Appalachian, like electric utilities generally, uses three kinds of permanent capital to finance its enterprise—long-term debt, preferred stock, and common equity.[14] The typical electric utility uses long-term debt and preferred stock to finance approximately two-thirds of its capitalization, thus minimizing the overall cost of capital to its customers.

The minimum rate level necessary to attract additional common equity, the most expensive type of capital, cannot be quantified precisely and frequently is the subject of dis-

13 External financing requirements would increase if refunds are ultimately required to be made under the Commission's orders in this case.

14 This differs sharply from the type of financing used by the Bluefield Water Works & Improvement Company in 1923 and the Hope Natural Gas Company in 1944. Both utilities in those times financed their operations entirely with common stock. The total capitalization of Bluefield in 1923 was $312,000 in common equity; that of Hope in 1944 included $28,000,000 in common equity.

agreement among experts. Contrastingly, the minimum rate level necessary to issue additional long-term debt and preferred stock can be precisely quantified employing legal criteria included in Appalachian's Mortgage and Deed of Trust and its Debenture Agreement for long-term debt and its Restated Articles of Incorporation for preferred stock. They are substantially similar to the standards required to be met by the great majority of investor-owned electric utility companies operating in the United States and, in addition, are required by the Securities and Exchange Commission to be followed by operating subsidiaries of public utility holding companies.[15] With respect to long-term debt, the ratio of defined earnings to interest charges on all long-term debt of the Company, including annualized interest charges on additional debt securities proposed to be issued, must be at least 2.0 times for a 12-consecutive-month period in the 15-month period prior to the month in which the new debt securities are to be issued. With respect to preferred stock, the gross income of Appalachian for 12 consecutive months in the 15-month period prior to the month of issue must equal at least 1½ times the aggregate of the annual interest charges on all indebtedness and the annual dividend requirements on all preferred stock including the preferred stock to be issued.

The end result of the Commission's orders was to reduce Appalachian's coverage ratios substantially below the legal minimums outlined above. The evidence before the Commission demonstrated that the coverage associated with Appalachian's Virginia business exceeded the legal minimums; but that associated with West Virginia business,

15 See SEC Public Utility Holding Company Act Release Nos. 13,105 and 13,106 (February 16, 1956); 3 Fed. Sec. L. Rep. (CCH) ¶¶ 36,675 and 36,691.

1.80 times for the 12 months ending December 31, 1976,[16] was so low as to reduce the Company's *total* coverage levels below the legal minimum requirements.

C. The Commission's Refusal to Consider Capital Attraction Requirements

The Commission's decision of May 6, 1977 ignored the question of adequate coverage necessary to attempt to attract new senior capital. In rejecting Appalachian's request for rehearing, the Commission said that: coverage is not a test of confiscation; coverage is greatly affected by changes in capital structure; and coverage is no more than a security device to restrain a company from imprudent future debt financing.[17] The West Virginia Court made no reference to the consideration of coverage.

16 Appalachian's coverage has fallen even below this level in succeeding months, assuming application of the Commission's order on the same basis. For the 12 months ended August 31, 1977 the debt coverage associated with West Virginia jurisdictional business was 1.66 times and total coverage was only 1.80 times.

17 Appendix, p. 91a. The Commission's refusal to consider the coverage consequences of its decision is in sharp contrast to the decisions of other regulatory agencies and other courts. For example, the Mississippi Supreme Court has said:

> It [interest coverage] must be considered in fixing a rate for an operating utility because the rate must produce enough profit to enable it [the company] to maintain the coverages required; otherwise, bonds and preferred stock could not be issued as needed for expansion of facilities required to properly serve the certificated area of the utility. *Mississippi Power Co.* v. *Miss. Pub. Serv. Comm'n*, 291 So.2d 541, 547 (Miss. 1974).

Similarly the New York Public Service Commission in granting a temporary emergency increase in order that interest coverage would be .25 times *greater* than the legal minimum has said that "Denial of a temporary rate increase here would, in our judgment, pose an unacceptable threat to the continued provision of service. . . ." *Niagara Mohawk Power Corp.*, 14 N.Y.P.S.C. 1244, 1249 (1974).

The Commission's first rationalization cannot withstand even cursory analysis. This Court has said:

> The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and *enable it to raise the money necessary for the proper discharge of its public duties. Bluefield, supra* at 679. (emphasis added)

If the minimal constitutional criteria for public utility rates include raising ". . . the money necessary for the proper discharge of its [the utility's] public duties," the plain meaning of this standard includes being able legally to issue the two least expensive types of permanent capital, long-term debt and preferred stock.

The Commission's second rationalization for ignoring a utility's coverage in establishing rates says nothing more than had Appalachian financed differently in the past, its coverage might be different today. The rationalization ignores totally that Appalachian cannot finance today and that at no time in the Commission's continuing regulation of Appalachian has it questioned the reasonableness of Appalachian's capital structure and no evidence has been offered to suggest that the Company's capital structure is unreasonable or unusual. The current capital structure of Appalachian, including an approximately 60% long-term debt ratio, results from the Company's efforts to finance through debt issues, the least expensive form of permanent capital, to the maximum extent practicable and prudent.[18]

18 To the extent Appalachian's debt may be somewhat higher than the Commission, on a *post hoc* basis, might prefer, the greater level of interest charges, being deductible for income tax purposes, reduces Federal income taxes and, to the same degree, the revenues required from customers. It is ironic that the Commission has no difficulty accepting this revenue reduction stemming from the use of debt financing but balks at the thought of making debt financing, prospectively at least, practicable.

The Commission's third rationalization that coverage is a security device to restrain imprudent future debt financing, of course, is partly true. What the Commission ignores is that the predominant reason future debt financing would be imprudent and would be unlawful is the unconstitutional rate levels established by the Commission. In effect the Commission is establishing rate levels which make it both financially imprudent and legally impossible for the utility to attract the capital necessary to carry out its public duties. This *post hoc* rationalization is effectively a Commission acknowledgment that the rates which have been established fail to meet the standards which this Court has established in *Bluefield* and *Hope*.

D. Impairment of Appalachian's Credit Standing

Appalachian's credit in the marketplace where it must compete to attract capital has been seriously eroded by the Commission's actions. Appalachian's senior securities are rated in the lowest category of any major electric utility in the United States. Standard & Poor's rates the Company's first mortgage debt and preferred stock BBB– and its debentures BB–. Moody's rates Appalachian's first mortgage debt Baa and the debentures Ba.[19] Appalachian's credit standing has been undermined to the point where its first mortgage bonds are not legal investments for savings banks in at least eight states. Since many state pension funds are restricted by law to investing in securities that

19 Until February 1975 the Company's long-term debt and preferred stock were rated A by both rating agencies. Standard & Poor's defines BBB bonds as follows:

> The BBB, or medium grade category is borderline between definitely sound obligations and those where the speculative element begins to predominate. These bonds have adequate asset coverage and normally are protected by satisfactory earnings. Their susceptibility to changing conditions, particularly to depressions, necessitates constant watching. Marketwise, the bonds are more responsive to business and

Footnote continued on next page

are legal investments for savings banks, the failure of Appalachian's first mortgage bonds to qualify as such legal investments is a further restriction on the Company's financing capability.

Recent downgradings of Appalachian's securities are directly attributable to the decisions of the Commission. Standard & Poor's explained why it reduced its ratings from BBB to BBB– in April 1976:

> *In view of the less than adequate rate relief granted the company over the past several years* particularly in West Virginia, *the sizable amount of revenues currently being collected subject to refund, and the high percentage of long-term debt in its capitalization, we have changed the rating on all outstanding First Mortgage Bonds of Appalachian Power from 'BBB' to 'BBB–' and accordingly have rated this issue 'BBB–'.* (emphasis added)[20]

II.

The Commission's Orders Unconstitutionally Burden Interstate Commerce.

The second question presented for the Court's consideration is whether rates which are so low as to preclude Appalachian from raising capital necessary for timely construction of facilities required for service to millions of

Footnote continued from previous page

> trade conditions than to interest rates. This group is the lowest which qualifies for commercial bank investment. Standard & Poor's Corporation: *Bond Guide*, September 1976, p. 6.

In contrast:

> Bonds given a BB rating are regarded as lower medium grade. They have only minor investment characteristics. In the case of utilities, interest is earned consistently but by narrow margins. In the case of other types of obligors, charges are earned on average by a fair margin, but in poor periods deficit operations are possible. *Id.*

20 Standard & Poor's Corporation: *Fixed Income Investor*, April 17, 1976, p. 760.

consumers in numerous states are an unconstitutional burden on interstate commerce in violation of the Commerce Clause.

The result of Appalachian's financial inability to carry out its construction program in a timely manner does not cease with the impairment of service to West Virginia consumers whose service is regulated by the Commission. It extends directly to Appalachian's 330,000 retail customers in Virginia whose service is regulated by the Virginia State Corporation Commission. It extends directly to Appalachian's 21 firm wholesale customers in Virginia, West Virginia and Tennessee (which in turn serve at least 109,000 retail customers) whose service is regulated by the FERC. It has a profound impact upon service to consumers of electricity in all jurisdictions served by subsidiaries of AEP. In short, the financial inability of Appalachian to carry out its construction program in a timely manner which directly results from the Commission's decision jeopardizes an adequate supply of electric energy to millions of consumers in numerous states.

Appalachian is, in the Commission's words, "one of the main sources of power generation and transmission for the American Electric Power System, of which it is an integral part" and "supplies wholesale electric service both within and outside of its retail market areas directly and indirectly by bulk transmission or displacement", which is done "not only through the integrated AEP system, but also through 26 major electric utility supply systems which make up the regional grid known as the ECAR (East Central Area Reliability) group and through system interconnected, non-ECAR electric utilities (TVA, Carolina Power & Light, Duke Power, Commonwealth Edison, Illinois Power, Central Illinois Public Service Company)."[21]

21 Appendix, pp. 3a and 4a.

The advantages of Appalachian's participation in the coordinated planning and construction of facilities on the multi-state AEP System have been aptly recognized by the Commission:

> Other than distribution facilities, most of Appalachian's construction of generation, transmission and other facilities is planned on an AEP *system* basis of need and *not* solely on the needs of Appalachian Power Company customers. In addition, the construction of facilities by Appalachian and the said ECAR and non-ECAR electric utilities are planned on a coordinated, timed basis. The advantages of a coordinated group of power systems to the assurance of adequate, reliable and continuous public service are well known. (emphasis in original)[22]

The capacity shortages which may shortly occur in the geographical area served by Appalachian and neighboring utilities recently have been confirmed. The National Electric Reliability Council (NERC) determined in July 1977 that generation deficits could begin in the ECAR region in 1981—which assumes the completion of Project 1301 by the winter of 1980/81—and in adjoining regions from 1979 to 1985.[23]

There can be no question that Appalachian is engaged in interstate commerce as it transmits electrical energy across state lines.

22 Appendix, p. 4a.

23 The National Electric Reliability Council: *7th Annual Review of Overall Reliability and Adequacy of the North American Bulk Power Systems* (July 1977), p. 7. NERC is a voluntary organization, formed in 1968 as a consequence of the Northeast blackout, with the stated purpose: ". . . further to augment the reliability and adequacy of bulk power supply in the electric utility systems of North America." (*Id.* at inside front cover) It consists of nine Regional Reliability Councils and encompasses essentially all of the power systems of the United States and the Canadian systems in Ontario, British Columbia, Manitoba and New Brunswick.

> In transmitting [electrical energy] across the state line, [the utility] is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution.[24]

The Commission's orders impose an impermissible burden on and interference with this interstate commerce by prescribing rates so low that timely completion of the Company's construction of its portion of the planned AEP system-wide construction program is imperiled.

The case of *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), is compelling. This Court found that Arizona legislation limiting the length of trains operated in that State contravened the Commerce Clause. The Court determined in reaching this decision that Congress had not superseded state regulation of train lengths by the Interstate Commerce Act, as amended,[25] and that a weighing of state and federal interests would be required. As stated by Mr. Chief Justice Harlan F. Stone,

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. (citations omitted)[26]

In the instant case, though Congress has occupied under the Commerce Clause that portion of the regulatory area prescribed by Part II of the Federal Power Act, as amended,[27] Congress has not superseded all state regulation which may affect interstate commerce. However, where the

24 *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165, 182 (1932).
25 49 U.S.C. § 1 *et seq.*
26 *Southern Pacific Co.* v. *Arizona, supra* at 769.
27 16 U.S.C. § 824(a), *et seq.*

Commission has overstepped the bounds of reasonableness, this Court, as "the final arbiter", must engage in "appraisal and accommodation of the competing demands of the state and national interests involved."[28] The Commission's orders impose a serious burden on interstate commerce conducted by Appellant and interpose a substantial obstruction to the national policy proclaimed by Congress "of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources."[29]

The decision of the Commission, if not reversed, will at a minimum result in the delay of major construction projects. That delay substantially increases the cost of those projects, a cost which must be absorbed by ratepayers in Virginia as well as in West Virginia.[30] In short, the Commission has set rates which are so low that, by impeding Appalachian's completion of its share of the AEP System's planned, timed construction program, the rates injure Appalachian's Virginia and FERC customers and the ultimate consumers of electric energy in other states.

Clearly, if the Commission had ordered Appalachian to sever its high-voltage transmission lines that carry needed electric energy to Virginia, and to and from Ohio and other neighboring states, so that Appalachian's electric system would have been isolated entirely within the State of West Virginia, there would be an unconstitutional interference with interstate commerce. In ordering rates which jeop-

28 *Southern Pacific Co.* v. *Arizona, supra* at 769.

29 Federal Power Act, 16 U.S.C. § 824a(a); see also *Southern Pacific Co.* v. *Arizona, supra* at 773.

30 For example, the delay which already is taking place in the construction of Project 1301 has increased the total cost of that project by about $160 million which in turn increases the rates which the customers must pay for that plant over the life of the plant by approximately $650 million.

ardize an adequate supply of electric energy to millions of consumers in numerous states the Commission is effecting exactly such an unconstitutional result.

If each individual state served by an integrated electric utility system, and offered the advantages of system-wide planning by that integrated system, could elect to cripple any participating utility located within its borders for the sake of short-term, rock-bottom rates, then such pools, encouraged by Section 202(a) of the Federal Power Act, soon would become meaningless and our Nation's power grid system would become a shambles of parochially insulated utilities. The public interest requires an appraisal and accommodation by this Court of the competing demands of the state and national interests.

Conclusion

The sum of the Commission's unconstitutional regulation can be stated succinctly—Appalachian's credit standing has been impaired, its ability to attract additional senior external capital has been eliminated and, accordingly, the supply of electric energy to millions of consumers in numerous states has been jeopardized.

In the past, this Court has noted that the determination "of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."[31] Appalachian's financial integrity has already been so impaired that a fair balance cannot be struck in this case. Rather, in this appeal the paramount interest is that of millions of consumers to obtain service through an adequate supply of electric energy. The energy crisis today is clearly among the most serious problems facing the country. The President of the

31 *Hope, supra* at 603.

United States has designated it his first priority and has called it "the moral equivalent of war".[32] Manifestly an adequate supply of electric energy is essential to sustain the economic heartbeat and social well-being of the Nation.

This Court should note probable jurisdiction, or, in the alternative, vacate the final orders appealed from and remand the case for such further proceedings as are necessary to permit Appellant an opportunity to earn a constitutionally adequate return, and this Court should grant Appellant such further relief as it may deem proper.

Respectfully submitted.

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32 N. Y. Times, April 19, 1977, at 24, col. 1.